

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:NED:BOS:TL-N-1825-99

BJLaterman

date:

AUG 13 1990

to: District Director, New England District
Charlie Marcou, Team Coordinator
Attn: Theresa Gorey, Case Manager, Group 1102

from: District Counsel, New England District, Boston

subject:

TEFRA Forms 872

Taxable Years [REDACTED], [REDACTED] and [REDACTED]

Earliest Statute Expiration: [REDACTED]

This is in response to your request that we provide advice regarding extending the statute of limitations for three TEFRA partnerships which are related to [REDACTED], for the taxable years [REDACTED], [REDACTED] and [REDACTED].

[REDACTED] ([REDACTED]) is a partnership which was established on [REDACTED]. [REDACTED] had two general partners: [REDACTED] ([REDACTED]), a domestic corporation, which in [REDACTED] and [REDACTED] owned [REDACTED] percent of the profits and losses of [REDACTED], and [REDACTED] ([REDACTED]), a foreign partnership which owned (in [REDACTED] and [REDACTED]) [REDACTED] percent of the profits and losses of [REDACTED]. [REDACTED] had two partners, [REDACTED] ([REDACTED]), a domestic corporation owning [REDACTED] percent, and [REDACTED] ([REDACTED]) a domestic corporation owning [REDACTED] percent.

The [REDACTED] return of [REDACTED] was signed by [REDACTED] ([REDACTED]), the current Vice President for Taxation of [REDACTED] ([REDACTED]). [REDACTED] did not designate a TMP on its [REDACTED] or [REDACTED] returns. We have not been provided with copies of the [REDACTED] and [REDACTED] returns. According to the taxpayer, the correct TMP of [REDACTED] is [REDACTED]. [REDACTED] had the same two partners in [REDACTED], [REDACTED] and [REDACTED], but their percentages of ownership had changed to [REDACTED] % and [REDACTED] %, respectively.

[REDACTED] ([REDACTED]) is another partnership which was established on [REDACTED]. [REDACTED] had two general partners: [REDACTED] ([REDACTED]), a

until [REDACTED]. No statute extensions have been secured for [REDACTED] and the statute for the partnerships for [REDACTED] expires on [REDACTED].

When [REDACTED], [REDACTED] and [REDACTED] were asked to sign further consents for [REDACTED] and [REDACTED] and to extend for [REDACTED], the legal department of [REDACTED] advised Exam that the correct TMP's were [REDACTED], [REDACTED], and [REDACTED]. The partnerships are not disavowing the prior consents. We have been orally informed by [REDACTED]'s tax department that all three partnerships are still in existence.

You have inquired as to:

(1) Whether prior partnership level consents executed by an indirect partner as tax matters partner (TMP) are valid; and

(2) What is the proper form of future consents, and who should sign such consents, where the taxpayer now maintains that a direct partner is the correct TMP and wishes to have such consents signed by the direct partner as TMP.

Because [REDACTED], [REDACTED], and [REDACTED] commenced on [REDACTED], after the effective date of the TEFRA partnership provisions, they have their tax treatment determined at the partnership level pursuant to I.R.C. §§ 6221 through 6233; P.L. 97-248, § 402(a). [REDACTED], [REDACTED] and [REDACTED] are not excluded from the TEFRA provisions by reason of the small partnership exception even though they each had ten or fewer partners, since the partners were not all individuals. I.R.C. § 6231(a)(1)(B)(i).

For purposes of the TEFRA partnership provisions, a partner is defined to include both a partner in the partnership, I.R.C. § 6231(a)(2)(A), and any other person whose income tax liability under subtitle A is determined in whole or in part by taking into account directly or indirectly partnership items of the partnership. I.R.C. § 6231(a)(2)(B). Thus, [REDACTED], ([REDACTED]) is considered to be a partner of the partnerships.

I.R.C. § 6229(a) provides, in general, that the period of limitations for assessing any tax attributable to a partnership item shall not expire before the date which is three years after the partnership return was filed. I.R.C. § 6229(b) provides that the partnership statute of limitations may be extended, with respect to any partner by an agreement between such partner and the Secretary, I.R.C. § 6229(b)(1)(A), or with respect to all partners, by an agreement between the Secretary and the Tax

Matters Partner or any other person authorized by the partnership in writing to enter into such an agreement. I.R.C. § 6229(b)(1)(B).

I.R.C. § 6231(a)(7) defines the Tax Matters Partner of a partnership as (A) the general partner designated as TMP as provided in the Treasury Regulations, I.R.C. § 6231(a)(7)(A), or (B) if there is no general partner who has been so designated, the general partner having the largest profits interest in the partnership at the close of the taxable year involved (or, where there is more than 1 such partner, the 1 of such partners whose name would appear first in an alphabetical listing). I.R.C. § 6231(a)(7)(B). If there is no general partner designated under subparagraph (A), and the Secretary determines that it is impracticable to apply subparagraph (B), the partner selected by the Secretary shall be treated as the Tax Matters Partner. For Tax Matters Partners selected by the Secretary after July 22, 1998, the Secretary shall, within thirty days of selecting a TMP, notify all partners required to receive notice under I.R.C. § 6223(a) of the name and address of the person selected. P.L. 105-206, § 3507(a).

The Secretary issued proposed regulations under I.R.C. § 6231(a)(7) on April 18, 1986, which became Temporary Regulations on March 2, 1987, and which reiterate that the TMP must be a general partner. A partnership may designate a TMP, or a designation of a partner as TMP may be terminated, only as provided in the regulations. Treas. Reg. § 301.6231(a)(7)-1(a). A person may be designated as a TMP if he is a general partner either at some time during the taxable year for which the designation was made, or at the time the designation is made. Treas. Reg., § 301.6231(a)(7)-1(b)(1)(i), (ii).

In the absence of a designation by the partnership, the general partner having the largest profits interest at the close of the taxable year shall be the tax matters partner. Treas. Reg. § 301.6231(a)(7)-1(m). In this case, [REDACTED] was not designated as the TMP but merely held itself out as TMP and executed consents purporting to bind all partners. [REDACTED] could arguably qualify under the provisions of I.R.C. § 6231(a)(7)(B) as the TMP since said entity is a partner for TEFRA purposes (I.R.C. § 6231(a)(2)(B)) and arguably had the largest profits interest in [REDACTED], [REDACTED] and [REDACTED] (by way of its [REDACTED] percent ownership of [REDACTED]). See PAE Enterprises v. Commissioner, T.C. Memo. 1988-222 where, in dicta, the Tax Court indicated that an indirect partner can be a TMP. Therefore, in our opinion the prior consents executed by the indirect partner, [REDACTED], are valid. Furthermore, because [REDACTED] held itself out to be TMP and execute the prior consents, the other partners may

be estopped from challenging the validity of those consents. See Cascade Partnership v. Commissioner, T.C. Memo. 1996-299.

General partners may designate a TMP by filing a statement with the Service Center in the form set forth in Treas. Reg. § 301.6231(a)(7)-1(e) and signed by the general partners holding a majority interest in the partnership. The statement shall

(1) Identify the partnership and the designated partner by name, address, and taxpayer identification number;

(2) Specify the partnership taxpayer year to which the designation relates;

(3) Declare that it is a designation of a tax matters partner for the taxable year specified; and

(4) Be signed by persons who were general partners at the close of the year and were shown on the return for that year to hold more than 50 percent of the aggregate interest in partnership profits held by all general partners as of the close of that taxable year. For the purposes of this paragraph (e)(4), all limited partnership interests held by general partners shall be included in determining the aggregate interest in partnership profits held by such general partners.

Therefore, the new consents may be signed by the entities identified by the taxpayer provided each partnership makes a proper designation of said entities as TMP as required under Treas. Reg. § 301.6231(a)(7)-1(e).

If we can be of any further assistance, please feel free to call the undersigned at (617) 565-7838.


BARRY J. LATERMAN
Special Litigation Assistant